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No. 800

In The
Supreme Court of the United States

A. P. VAN METER ET AL.,
Appellants,

VERSUS

JACK D. ABRAHAM, ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION

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FEBRUARY, 1957.

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In The
Supreme Court of the United States

A. P. VAN METER: ROBBERSON STEEL COMPANY, a Corporation: CAPITOL STEEL & IRON COMPANY, a Corporation: ASSOCIATED INDUSTRIES OF OKLAHOMA: and AERO DESIGN & ENGINEERING CO., a Corporation,

Appellants,

VERSUS

JACK D. ABRAHAM, ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with rules 13 and 15 the appellants submit herewith their statement as to the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment entered in this cause by the Supreme Court of the State of Oklahoma.

I.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is appended hereto. It is reported at 303 P. 2d 434. It has not yet been reported in the official state reports.

II.

JURISDICTION

This appeal involves the same controversy as the appeal filed concurrently herewith from the United States District Court for the Western District of Oklahoma, captioned: *Aero Design & Engineering Co. et al.* v. *Oklahoma Employment Security Commission et al.*

Appellants doubt that this Court has jurisdiction of this appeal because of the absence in the state Supreme Court of a party defendant with personal interest in the litigation. Nevertheless (as hereinafter explained) the judgment hereby sought to be appealed from has been asserted as *res judicata* against appellants in *Aero Design & Engineering Co. et al.* v. *Oklahoma Employment Security Commission et al.* This present appeal is being docketed to assure that the litigation of this controversy will not be concluded on the theory of *res judicata*. If appellants are without right to take this appeal, then the Oklahoma Supreme Court decision cannot be *res judicata* against them.

50 C. J. S. 384.

In that event the constitutional question can properly be resolved in the Federal court appeal (*i.e.*, *Aero Design & Engineering Co. et al.* v. *Oklahoma Employment Security Commission et al.*). On the other hand, if this Court finds that it has jurisdiction of this appeal, the constitutional question can be resolved herein.

The present action was brought in the Supreme Court of Oklahoma as an original proceeding for writ of prohibition against A. P. Van Meter, Judge of the District Court of Oklahoma County, Oklahoma, to command him to dissolve a restraining order *pendente lite* theretofore issued by him in a case pending before him. The jurisdiction of the Supreme Court of Oklahoma was invoked under Article VII, Section 2 of the Constitution of Oklahoma. One of the questions presented to the Supreme Court of Oklahoma was whether a "double affirmation clause" in the Oklahoma Employment Security Act violates the due process of law clause of the 14th Amendment to the Federal Constitution. The state Supreme Court held that the 14th Amendment was not violated.

The judgment of the Supreme Court of Oklahoma was dated and entered November 7, 1956. The Notice of Appeal to the Supreme Court of the United States was filed January 4, 1957, in the office of the Clerk of the Supreme Court of Oklahoma.

Jurisdiction of this appeal is conferred by 28 U. S. C. § 1257.

The following cases sustain the jurisdiction of this Court upon appeal from the highest court of a state where there is drawn in question the validity of a state statute on the grounds that it is repugnant to the Consti-

tution of the United States and where the decision of the highest state court is in favor of its validity:

Winters v. *New York*, 333 U. S. 507, 92 L. Ed. 840, 68 S. Ct. 665;

Wieman v. *Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 S. Ct. 215.

On the other hand, doubt exists as to the jurisdiction of this Court because only the appellant A. P. Van Meter was a party to the record in the Supreme Court of Oklahoma. A. P. Van Meter is the District Judge of Oklahoma County, Oklahoma, and was named a defendant in the original proceeding in the Supreme Court of Oklahoma for writ of prohibition solely because of his official capacity as District Judge and for the purpose of prohibiting him from enforcing a restraining order which he had issued. He has no personal interest whatever in the litigation. Accordingly, it is doubted that he can appeal.

County Court v. *State of West Virginia*, 208 U. S. 192, 52 L. Ed. 450, 28 S. Ct. 275;

Stewart v. *City of Kansas City*, 239 U. S. 14, 60 L. Ed. 120, 36 S. Ct. 15;

Caffrey v. *Territory of Oklahoma*, 177 U. S. 346, 44 L. Ed. 799, 20 S. Ct. 664;

Marshall v. *Dye*, 231 U. S. 250, 58 L. Ed. 206, 34 S. Ct. 92.

The other appellants, not being parties to the record, doubt that they are entitled to appeal to this Court.

United Staets v. *Jack*, 244 U. S. 397, 61 L. Ed. 1222, 37 S. Ct. 605;

54 Am. Jur. 835.

Three of the appellants were *amici curiae* in the Supreme Court of Oklahoma, but doubt that as such they can appeal.

2 Am. Jur. 950.

This appeal involves the validity of a portion of the Oklahoma Employment Security Act[1]. That Act provides a program of unemployment compensation "for the benefit of persons unemployed through no fault of their own"[2]. It establishes eligibility requirements for claimants[3] and certain disqualifications[4]. Procedurally it provides for the filing and processing of claims[5]. A claim is first determined by a representative of the Commission[6], whose decision is appealable to the Appeal Tribunal, which consists of a "referee"[7]. In "labor dispute" cases the initial hearing is before the Appeal Tribunal[8]. In either event an appeal lies from the Appeal Tribunal to a Board of Review[9]. After these administrative steps there is a right to "judicial review" by the District Court[10]. Unemployment benefits are paid from the Okla-

[1]40 Okl. Stat. § 211 et seq.
[2]Declaration of public policy, 40 Okl. Stat. § 212, as amended in 1953.
[3]40 Okl. Stat. § 214.
[4]40 Okl. Stat. § 215.
[5]40 Okl. Stat. § 216.
[6]40 Okl. Stat. § 216 (c).
[7]40 Okl. Stat. § 216 (d) (1) and (2).
[8]40 Okl. Stat. § 216 (c) (2).
[9]40 Okl. Stat. § 216 (d) (3); 40 Okl. Stat. § 220 (c).
[10]40 Okl. Stat. § 216 (d) (7).

homa Unemployment Compensation Fund[11], which is maintained by "contributions" paid by the employers of the state[12]. An employer's contribution rate is determined by a table[13], and is affected by his own "benefit wage ratio"[14] as well as the "state experience factor"[15].

The particular portion of the Act under attack here is 40 Okl. Stat. Supp. 1955, § 216 (e), the "double affirmation clause". It appears at page 316 of the 1955 Supplement to Oklahoma Statutes. It provides (the objectionable portion being italicized):

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[11]40 Okl. Stat. § 219.

[12]40 Okl. Stat. § 217.

[13]40 Okl. Stat. § 217 (c) (6).

[14]In computing an employer's benefit wage ratio, two items are used: (1) the total of the benefit wages charged against his account during the three preceding calendar years, and (2) the total of his taxable payrolls for those same three years. The Commission divides the total taxable payrolls into the total benefit wages and the percentage figure thus obtained is the employer's benefit wage ratio. 40 Okl. Stat. § 217 (c) (4). The term "benefit wages" refers to the wages received by a claimant from the employer during a twelve months period preceding the filing of his claim. They are "treated * * * as though they had been paid in the calendar year in which such benefits are paid". Thus an employer's account is not charged for the amount of benefits paid to a claimant, but for the amount of wages which he paid the claimant during employment. 40 Okl. Stat. § 217 (c) (2). An "employer's benefit wages" is the total of all benefit wages for former employees who receive benefits during the year. 40 Okl. Stat. § 217 (c) (3).

[15]In computing the state experience factor, two items are used: (1) benefit wages for the entire state, and (2) actual benefits paid for the entire state. The Commission takes the total of the benefit wages charged against all employers for the three preceding calendar years and divides them into the total benefits paid during the same three years. The percentage figure thus obtained becomes the state experience factor. 40 Okl. Stat. § 217 (c) (5).

"PAYMENT OF BENEFITS. Benefits shall be promptly paid on any claim in accordance with a determination or redetermination, unless a party files an appeal with an appeal tribunal as provided in this Section. If pursuant to a determination or redetermination benefits are payable in any amount as to which there is no dispute, or with respect to unemployment following the maximum disqualification period that may be imposed because of an alleged factor surrounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal. The commencement of a proceeding for judicial review pursuant to Section 216 (d) of this Title shall not operate as a supersedeas or stay unless the Board of Review shall so order and the filing of a petition for judicial review by the Commission from a decision of the Board of Review which allowed benefits shall not authorize the board or any court to direct the denial of any benefits which would have been payable under the Board of Review's decision. *If a determination allowing benefits is affirmed in any amount by an appeal tribunal or is so affirmed by the Board of Review, or if a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Board of Review, such benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the Board or any court* but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal. Provided, however, that if the Commission determines that an individual is ineligible by reason of Section 214 (f) of this Title no claim shall be paid for any week during such period of ineligibility until such determination has been reversed through the pro-

cedure for appeal provided herein and such reversal has become final."

Although the particular employer's account is not charged for an erroneous determination, funds once disbursed from the Fund are never recovered. Thus the Fund is permanently depleted, if, because of the double affirmation clause, a claim is paid on an erroneous determination.

III.

THE QUESTIONS ON APPEAL

The questions presented by this appeal, as stated in the Notice of Appeal, are:

1. Do the appellant employers as taxpayers and as contributors to the Oklahoma Unemployment Compensation Fund have a right to maintain an action to enjoin the Oklahoma Employment Security Commission from making unlawful and unconstitutional disbursements from the fund?

2. Does the "double affirmation clause" (40 Okl. Stat. Supp. 1955 § 216 e) of the Oklahoma Employment Security Act violate the due process of law clause of the 14th Amendment to the Constitution of the United States in so far as it purports:

(a) to direct the payment of unemployment compensation benefits from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits, and

(b) to prohibit injunction, supersedeas, stay or other writ or process of a court suspending the payment of such benefits pending judicial review

after completion of the administrative proceedings awarding benefits?

3. Are the appellant employers entitled to equitable injunctive relief to restrain the Oklahoma Employment Security Commission from making payment of unemployment compensation benefits from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits, there being no procedure (except in fraud cases) whereby benefits once paid can be recoverd for the Fund in the event of a final judicial determination that the administrative award of benefits was erroneous?

IV.

STATEMENT OF THE CASE

Simply stated, the question raised by the present case is:

Can unemployment compensation benefits constitutionally be paid from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits?

The Supreme Court of Oklahoma answered this question in the affirmative, and thereby disagreed with the supreme courts of Michigan and Pennsylvania.

The particular compensation claimants are some 267 strikers. On November 29, 1955, they went on strike at their place of employment, the Aero Design & Engineering Co. plant at Bethany, Oklahoma. They struck be-

cause contract negotiations between their union and their employer had not produced the contract which they wanted.

These strikers, after leaving their jobs, applied to the Oklahoma Employment Security Commission (hereinafter called Commission) for unemployment benefits. Their employer, Aero Design & Engineering Co., received notice of their applications for benefits and made timely protest, contending that the strikers were ineligible to receive benefits (by reason of 40 Okl. Stat. § 214, as interpreted in the second syllabus by the Court in *Board of Review* v. *Mid-Continent Petroleum Corporation*, 193 Okl. 36, 141 P. 2d 69[16]) and also that the strikers were disqualified from receiving benefits (by reason of 40 Okl. Stat. § 215 d[17]).

An administrative hearing was held by an Appeal Tribunal referee of the Commission, who ruled that the strikers could receive unemployment benefits subsequent to January 1, 1956. Aero Design then appealed to the next administrative level, the Commission's Board of Review. The Board of Review modified and affirmed the

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16 "An individual who ceases work by reason of a labor dispute or strike against his employer is ineligible for benefits under the Oklahoma Unemployment Compensation Law of 1936, so long as he participates in such dispute and remains out of employment by reason thereof."

17 "An individual shall be disqualified for benefits * * * For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work * * * because of a labor dispute * * *."

referee's ruling and allowed benefits subsequent to February 12, 1956.

By statute [40 Okl. Stat. § 216 (d) (7)] an employer aggrieved by a Board of Review decision is allowed a "judicial review" by the state District Court. Aero Design at once petitioned for such judicial review. At this point Aero Design was confronted with the statutory provision which the present case concerns, the so-called "double affirmation clause", 40 Okl. Stat. Supp. 1955, § 216 (e), set out above.

The double affirmation clause directs disbursement of unemployment benefits after two affirmative administrative awards (*i.e.*, by the Appeal Tribunal referee and by the Board of Review) *notwithstanding the filing of a petition for judicial review*. It further expressly prohibits injunction, supersedeas, stay or other writ or process suspending the payment of benefits pending judicial review. Except in fraud cases, no procedure exists for the recovery, in the event of a subsequent judicial reversal of the administrative award, of benefits already disbursed. In other words, the money, once paid from the Fund, is gone forever, whether paid lawfully or unlawfully, and the question of the claimants' lawful entitlement to the benefits becomes somewhat moot if under the double affirmation clause the benefits have already been paid before the question is judicially resolved.

When Aero Design petitioned for judicial review of the Board of Review decision it asked the District Court of Oklahoma County, Oklahoma, for a restraining order *pendente lite* to prevent disbursement of the benefits pending the judicial review. The basis upon which this was sought was the unconstitutionality of the double affirmation clause, as theretofore held by other state courts, including Michigan (*Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302; cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44), Indiana (*State ex rel. Campbell* v. *State*, 223 Ind. 59, 57 N. E. 2d 433), and Iowa (*Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303), and thereafter by Pennsylvania (*Pennsylvania State Chamber of Commerce* v. *Torquato*, 125 A. 2d 755). At this point in the litigation Aero Design raised the federal question sought to be reviewed, to-wit: that the double affirmation clause of the Oklahoma Employment Security Act violates the due process of law clause of the 14th Amendment to the Constitution of the United States. This was raised by the following allegation in the Petition for Judicial Review:

> "That notwithstanding this appeal the defendants * * * unless restrained by this Court will disburse to the aforesaid claimants unemployment compensation benefits by reason of purported authority of 40 O. S. 216e (known as the 'double affirmation clause') * * * that plaintiff as a contributor to the unemployment compensation fund has a property right therein and such disbursement prior to final determination of this cause would deprive plaintiff

of due process of law in violation of the 14th Amendment to the Constitution of the United States and Section 7 of Article II of the Constitution of Oklahoma, by reason whereof said defendants should be restrained and enjoined from making such disbursement prior to the final determination of this cause."

The District Court of Oklahoma County, Oklahoma, granted a temporary restraining order when the petition for judicial review was filed, and thereafter issued a restraining order *pendente lite* to prevent the disbursement of benefits before the hearing and ruling on the merits, thereby upholding Aero Design's contention that the double affirmation clause violates the due process of law clause of the 14th Amendment. The District Court then set the hearing on the merits two weeks hence, and assured prompt consideration of the case.

At that point the strikers applied to the Supreme Court of Oklahoma for a writ of prohibition to compel the District Judge, A. P. Van Meter, to vacate the restraining order *pendente lite*. At the strikers' request, the Supreme Court notified the District Judge not to proceed on the merits until the writ of prohibition was considered. (The strikers later requested that the hearing on the merits be abated pending an action brought by Aero Design & Engineering Co. in Federal Court, which action is the one appealed from on this date captioned *Aero Design & Engineering Co. et al.* v. *Oklahoma Employment Security Commission et al. Because of these requests by*

the strikers, the petition for judicial review is still pending on the merits. But for these requests by the strikers, the judicial review would have been completed in June, 1956.)

In the state Supreme Court the District Judge filed a Response to Application to Assume Original Jurisdiction, wherein he asserted:

> "That the Restraining Order *Pendente Lite* is justified by the apparent unconstitutionality of 40 O. S. 216 (e) (known as the 'double affirmation clause') insofar as said section authorizes disbursement of unemployment compensation benefits prior to a final determination that claimants are lawfully entitled to receive such benefits; that payment of such benefits prior to such final determination would deprive those contributing to and having a property right in the Unemployment Compensation Fund of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article II, Section 7, of the Constitution of Oklahoma."

Thereby the federal question was raised in the state Supreme Court. It was reiterated in briefs filed by *amici curiae*.

The Supreme Court of Oklahoma issued the requested writ of prohibition to the District Judge, *Abraham* v. *Van Meter*, 303 P. 2d 434, as evidenced by the appended opinion. (Actually, no formal "writ" as such was prepared, except to the extent that the opinion itself constitutes a writ.) The way in which the court passed upon the federal question is disclosed by the syllabus by the court:

"The provision of the Oklahoma Employment Security Act [Tit. 40 O. S. 1951 § 216(e)] for payment of unemployment insurance benefits where the decision for such payment by an appeal tribunal of the Oklahoma Employment Security Commission is 'affirmed in any amount' by said Commission's Board of Review is not unconstitutional as in violation of Art. VII, Sec. 10, of the Oklahoma Constitution, or as denying 'due process' to the last employer of the claimants of such benefits, and other employer-contributors to the unemployment compensation fund, in violation of Art. II, Sec. 7 of said Constitution and the 14th Amendment of the U. S. Constitution."

In Oklahoma the syllabus by the court states the law of the case.

Corbin v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45;

City of Altus v. *Martin*, ... Okl. ....., 268 P. 2d 228, 234;

12 Okl. Stat. § 977.

VI

THE SUBSTANTIAL NATURE OF THE FEDERAL QUESTIONS PRESENTED

The syllabus just quoted from the Oklahoma Supreme Court's decision shows that that court's ruling is precisely within the category of 28 U. S. C. § 1257 and the cases cited above to sustain jurisdiction.

The Constitutional question raised by this appeal is doubly federal in nature: (1) Appellants' alleged right to relief arises under the due process of law clause of the

14th Amendment and (2) The question involves the nation-wide unemployment compensation program which is sponsored by the Federal government. The precise Federal constitutional question has been answered differently by different state supreme courts, without any apparent justification for the 14th Amendment to be construed one way in some states and otherwise in others.

The Oklahoma Employment Security Act was enacted (as were the unemployment compensation acts of the 47 other states) pursuant to the Social Security Act of August 14, 1935. They are all part of the federally-sponsored social security program. The Federal government originally furnished model acts for consideration by state legislatures. The Social Security Act (42 U. S. C. § 503) prescribes mandatory standards to be met by the state statutes in order to qualify under the Federal program.

The so-called "double affirmation clause" appears in many if not most of the state acts, *but it is not required by the Social Security Act*. Nevertheless it constitutes a salient feature of the state acts. In most states the constitutionality of the double affirmation clauses has not yet been attacked.

As subsantial contributors thereto, appellants have a property right in the Oklahoma Unemployment Compensation Fund. Other state courts have so held.

Chrysler Corporation v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44:

Pennsylvania State Chamber of Commerce v. *Torquato*, 125 A. 2d 755:

Carnegie-Illinois Steel Corporation v. *Board of Review*, 117 Ind. App. 379, 72 N. E. 2d 662.

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1. The various State Supreme Courts are in conflict as to the constitutionality of the "double affirmation clause".

In Michigan and Pennsylvania a double affirmation clause in an unemployment compensation law violates the due process of law clause of the 14th Amendment to the Federal Constitution, but in Oklahoma the same clause does *not* violate the 14th Amendment, according to the Supreme Court of Oklahoma. We submit that this conflict presents a substantial question to be resolved by this Court. The conflict is demonstrated by the following enumeration of the cases which have dealt with double affirmation clauses:

(1) *Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44, double affirmation clause held INVALID under due process of law clause of the 14th Amendment.

(2) *Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303, double affirmation clause held INVALID as

denying opportunity for full judicial review and thus violating governmental principle of division of powers.

(3) *State ex rel. Campbell* v. *State*, 223 Ind. 59, 57 N. E. 2d 433, double affirmation clause held INVALID, following *Chrysler* and *Horne cases*.

(4) *Pennsylvania State Chamber of Commerce* v. *Torquato*, 125 A. 2d 755, (petition for writ of cert. filed December 31, 1956, docket No. 669) double affirmation clause held INVALID under due process of law clause of the 14th Amendment.

(5) *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280, 109 P. 2d 942, double affirmation clause enforced, apparently for lack of exhaustion of administrative remedies: not attacked on constitutional grounds.

(6) *State ex rel. Aikens* v. *Davis*, 131 W. Va. 40, 45 S. E. 2d 486, double affirmation clause held VALID, following above California decision.

(7) *Todd Shipyards Corp.* v. *Texas Employment Commission*, 245 S. W. 2d 371, double affirmation clause attacked, but validity not determined because of procedural deficiency.

(8) *Abraham* v. *Van Meter*, ... Okl. ....., 303 P. 2d 434, double affirmation clause held VALID, following California decision.

The most direct conflict is shown by Oklahoma being on the one side, holding the 14th Amendment not to be

violated, and Michigan and Pennsylvania holding the exact opposite.

Because of this conflict among the states, we submit that the question ought to be resolved by this Court, so as to enable uniform application of the 14th Amendment in all states.

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2. The double affirmation clause conflicts with this Court's previous interpretations of the due process of law clause of the 14th Amendment.

Although this Court has not passed upon the constitutionality of a double affirmation clause (having denied certiorari in *Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44) there are a number of decisions by this Court which announce the principles applicable to this case. We submit that adherence to these decisions requires invalidating the double affirmation clause, and that a substantial question thus exists by the Oklahoma decision not being in accord with this Court's decisions.

It has been long recognized that due process of law requires the right to judicial review of administrative proceedings.

16A C. J. S. 873, 876:

Chicago, Milwaukee and St. Paul v. *State of Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462:

St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720;

Crowell v. *Benson*, 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

This rule of law pertains in Oklahoma.

Union Indemnity Co. v. *Saling*, 166 Okl. 133, 26 P. 2d 217, 221;

Associated Industries of Oklahoma v. *Industrial Welfare Commission*, 185 Okl. 177, 90 P. 2d 899, 7th paragraph of the syllabus by the Court.

Where an appeal from an administrative agency to a court is provided, but no provision is made for supersedeas, the lack of the right to supersedeas is a denial of due process.

Porter v. *Investors Syndicate*, 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617;

Oklahoma Natural Gas Company v. *Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

Pacific Telephone & Telegraph Company v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 976, 44 S. Ct. 553.

Applying the principles (1) that due process of law requires the right of judicial review of administrative decisions and (2) that where a right of appeal or judicial review exists the denial of the right to supersedeas is a denial of due process of law, it follows that in the Okla-

homa Employment Security Act the permissive judicial review of administrative decisions (which is constitutionally mandatory) is lacking in due process of law because the right of supersedeas is denied by the double affirmation clause.

Chrysler Corporation v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302; cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44;

Pennsylvania State Chamber of Commerce v. *Torquato*, 125 A. 2d 755.

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3. Reasons why the question presented is so substantial as to require plenary consideration.

The decision by this Court of the basic Federal constitutional question—whether or not double affirmation clauses violate the due process of law clause of the 14th Amendment—will affect the unemployment compensation programs of a majority of the states.

The decision will necessarily overrule the highest court of one or more states, for the state court decisions are in direct conflict.

Appellants feel that any decision which is bound to overrule one or more state courts, especially on a Federal constitutional question, is of sufficient importance to justify plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

EDWARD E. SOULE,
Commerce Exchange Building,
Oklahoma City, Oklahoma;

ROBERT J. EMERY,
Commerce Exchange Building,
Oklahoma City, Oklahoma;

CLARK NICHOLS,
Colcord Building,
Oklahoma City, Oklahoma;

BEN L. BURDICK,
First National Building,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

FEBRUARY, 1957.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JACK D. ABRAHAM, ET AL., Plaintiffs,	)	
v.	)	
	)	No. 37396
HONORABLE A. P. VAN METER, DISTRICT JUDGE, OKLAHOMA COUNTY, OKLAHOMA, EMPLOYMENT SECURITY COMMISSION, BRUTON WOOD, DAVE VANDIVER, HUGH HARRELL, T. C. "TED" KNOOP, E. R. BURNS, TOM CHESHER and MARK NEUMANN, Defendants.	)	

SYLLABUS

The provision of the Oklahoma Employment Security Act [Tit. 40, O. S., 1951, Sec. 216(e)] for payment of unemployment insurance benefits where the decision for such payment by an appeal tribunal of the Oklahoma Employment Security Commission is "affirmed in any amount" by said Commission's Board of Review is not unconstitutional as in violation of Art. VII, Sec. 10, of the Oklahoma Constitution, or as denying "due process" to the last employer of the claimants of such benefits, and other employer-contributors to the unemployment compensation fund, in violation of Art. II, Sec. 7 of said Constitution and the 14th Amendment of the U. S. Constitution.

Original action by claimants of unemployment insurance benefits allowed them by the Oklahoma Employment Security Commission, against the Honorable

A. P. Van Meter, Judge of the District Court within and for Oklahoma County, State of Oklahoma, for a writ to compel said Judge and Court to vacate an order entered in Cause No. 138693 of said Court restraining payment of said benefits during the pendency of said cause.

WRIT GRANTED

C. W. Schwoerke, and
W. A. McWilliams, Oklahoma City, and
Harry Clark, Kansas City, Missouri.
For Plaintiffs.
Lytle, Johnston & Soule, Oklahoma City,
For Defendant, A. P. Van Meter.
Withington, Shirk, Nichols & Clifford, and
Tom Watts, Oklahoma City,
For Amicus Curiae,
Robberson Steel Company,
Capitol Steel & Iron Company,
Associated Industries of Oklahoma.

BLACKBIRD, J.:

The correct determination of whether or not this Court should assume jurisdiction and issue the writ herein sought, requires a determination of the constitutionality of a certain portion of the legislation originally enacted in 1936, and designated as the "Oklahoma Unemployment Compensation Law," and which, as later amended, has been given the official designation of "Oklahoma Employment Security Act" (Tit. 40, O. S., 1951, Secs. 211, *et seq.*)

One of the principal purposes of this body of legislation, which we will hereinafter refer to merely as the "Act", "Statute", or "Law" is to obtain for the indi-

viduals, to which it applies, compensation, on a weekly basis, for periods of their unemployment. To effectuate this purpose, it contains comprehensive and detailed provisions governing the payment of such monetary benefits from a special fund called the "unemployment compensation fund", under the administration of a body, appointed by the Governor, and known as the "Oklahoma Employment Security Commission", hereinafter referred to merely as the "Commission." (Secs. 219, 220, *Ibid.*).

Besides providing for the filing of claims for such benefits by individuals, the Act prescribes certain requirements for their eligibility, and a system, within the framework of the Act itself, by which eligibility shall be determined. Thus, Sec. 214 of said Act prescribes certain findings that the Commission must make before an unemployed person will be eligible for such benefits in respect to any week. One of these findings is that said person is not only able to work, but that he is "available for work." [Subsec. (c), *Ibid.*]. Sec. 214, subsection (d) (1) provides that "No week shall be counted as a week of unemployment * * * (for the purpose of said subsection); * * * (3) Unless the individual was eligible for benefits with respect thereto as provided in Sections 5 and 6" of the Act. The section 6, referred to, now appears as Section 215 of Title 40, *supra*. Said section prescribes certain circumstances under which an individual shall be disqualified for benefits. One of them, set forth in sub-

section (c) of said section, is the claimant's having "failed, without good cause, either to apply for or accept if offered, available, *suitable* work * * *". (Emphasis ours). Paragraph (2) of said subsection (c) provides, among other things, that no work shall be deemed "suitable", nor benefits be denied any otherwise eligible person for refusing to accept new work:

> "(A) If the position offered is vacant due directly to a strike, lockout or other labor dispute; * * *".

According to said section, an individual may also be disqualified for benefits:

> "(d) For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work which exists at the factory, establishment or other premises at which he is or was last employed, because of a labor dispute; * * *."

The present controversy arises out of claims for unemployment benefits filed under the above-described Act by one Jack D. Abraham and 256 other former employees of the Aero Design & Engineering Company of Bethany, Oklahoma. Said claimants were members of the United Auto Workers Union and became unemployed as a result of a labor dispute which was later determined to have existed on November 29th, 1955, and, as far as is revealed herein, still continues. As Section 216(c) (2) of the Act requires such procedure for determination of issues concerned in claims involving the application of the above-quoted provisions of Sec. 215(d), *supra*, ["Section 6

(d)"], when so directed by the Commission, the aforesaid claims were transmitted to an "Appeal Tribunal" for the purpose of determining whether claimants should be disqualified for benefits for the week beginning January 1, 1956, and the following weeks, because of the labor dispute. After investigations and hearings, as prescribed in the Act, the Appeal Tribunal found that a stoppage of work resulted from the dispute until December 28, 1955, and (apparently) held that claimants were not disqualified for unemployment benefits after that date. Subsequently, claimants filed a petition for an additional finding of fact as to the extent, if any, of the curtailment of operations at the employer's three plants and, pursuant thereto, Referee Dwight K. Starr, as Appeal Tribunal, made a written "determination" in February, 1956, in which he found that the labor dispute, which existed November 29, 1955, ceased to exist on January 1, 1956; and that therefore there "was no longer a sound basis" for claimant's disqualification for benefits by reason of a work stoppage. Thereafter, a "further appeal" [prescribed by subsection (d), paragraphs (3)-(6), incl., of Section 216, *supra*] was taken to the Board of Review, which, upon consideration of the Commission's records, a transcript of the testimony taken before the Appeal Tribunal, additional testimony offered before said Board and briefs and argument of counsel, promulgated its decision on May 22, 1956. In its written

opinion then filed in said matter, the Board modified the Appeal Tribunal's aforesaid determination, by concluding that the work stoppage ceased to exist on February 12, 1956 (instead of January 1st, as found by the Appeal Tribunal), and allowed benefits to claimants for and after that date.

Thereafter, the employer, Aero Design & Engineering Company, in view of its right under subsection (d), paragraph (7) of Section 216, *supra*, to have the Board's decision judicially reviewed, instituted an action in the District Court of Oklahoma County. In said action, docketed as said Court's Cause No. 138693, said plaintiff named as defendants, not only the aforesaid claimants, but also the Board of Review, and its members, and the Oklahoma Employment Security Commission, and its members. The petition filed in said court action prayed the court, among other things, not only to reverse the Board of Review's aforedescribed decision on the ground that claimants were (1) ineligible for benefits as being "unavailable for work" within the meaning of Section 214, *supra*, and (2) disqualified from receiving such benefits by reason of a "stoppage of work" within the meaning of Section 215(d), but it also prayed that the defendant, Oklahoma Employment Security Commission, its members, and its Executive Director and Chief of Benefits, be restrained and enjoined from disbursing any such benefits to the defendant claimants during the pendency

of said action. Pursuant to said prayer, and before any hearing on the merits of said Cause No. 138693, one of the Judges of said district court entered an order in said cause, on May 23, 1956, temporarily restraining any and all disbursement of the aforedescribed monetary benefits. Thereafter, the claimant defendants filed a motion to dissolve said order and also a plea to said court's jurisdiction.

After the temporary order was supplanted by "RESTRAINING ORDER PENDENTE LITE" entered in said cause on June 7, 1956, by the Honorable A. P. Van Meter, one of said district court's judges, said claimants, who appear herein as petitioners, filed this original action, alleging, among other things, that, in entering said order, Judge Van Meter and the court for which he was acting, assumed to exercise power not granted it by law and praying that we issue a writ commanding him to dissolve the aforesaid order in said Cause No. 138693, and that we also order the respondent, Oklahoma Employment Security Commission, to pay the unemployment benefits provided by "Oklahoma Statutes" and now being withheld from them under said District Court's aforementioned restraining order.

Petitioners' position that by issuing the restraining order the Respondent Judge has exceeded his legal authority is based upon sub-sec. (e) of Sec. 216, *supra*, which reads as follows:

"PAYMENT OF BENEFITS. Benefits shall be promptly paid on any claim in accordance with a determination or redetermination, unless a party files an appeal with an appeal tribunal as provided in this Section. *If pursuant to a* determination or *redetermination benefits are payable in any amount* as to which there is no dispute, or *with respect to unemployment following the maximum disqualification period that may be imposed because of an alleged factor surrounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal. The commencement of a proceeding for judicial review pursuant to Subsection (d) (7) of this Section shall not operate as a supersedeas or stay unless the Board of Review shall so order and the filing of a petition for judicial review by the Commission from a decision of the Board of Review which allowed benefits shall not authorize the Board or any court to direct the denial of any benefits which would have been payable under the Board of Review's decision.* If a determination allowing benefits is affirmed in any amount by an appeal tribunal, or is so affirmed by the Board of Review, or *if a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Board of Review, such benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by* the Board or *any court* but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal." (Emphasis ours.)

In his Response to the application herein, the respondent District Judge seeks to justify his issuance of the RESTRAINING ORDER PENDENTE LITE [in contravention of the above-quoted Section 216(e)] on the

ground of the "apparent unconstitutionality" of its emphasized provisions (the latter portion of which is part of the so-called "double affirmation clause") in so far as they authorize "disbursement of unemployment benefits prior to a final determination that claimants are lawfully entitled" to receive them. He says said section is in contravention of the power granted district courts by Art. VII, sec. 10, to grant restraining orders and injunctive relief, and that the disbursement thereby authorized "would deprive those contributing to, and having a property right in, the Unemployment Compensation Fund (,) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Article II, Section 7, of the Constitution of Oklahoma."

Robberson Steel Company, Capitol Steel & Iron Co., and Associated Industries of Oklahoma appear herein as *amicus curiae* with argument contemplated to support, and against disturbing, the respondent court's action, and, with the claim, among others, that as employers and contributors to the Unemployment Compensation Fund, they have a property right in it, and an interest in seeing that it is used only for lawful purposes. In this connection they say the contribution rate of all employer-contributors to said Fund "is determined in a large measure by the State Experience Factor as set out in the Act, and in as much as this State Experience Factor is de-

termined by the amount of benefit wages and benefit payments of all covered employees in the State, any increase in benefits paid to such employees will tend to increase the State Experience Factor and will therefore increase" their rate of contribution to the Unemployment Compensation Fund.

As we view the matter, it has not been demonstrated that the operation or enforcement of the Act in question will have the effect of taking any property, without due process of law, from Aero Design & Engineering Company, or any former employer situated similarly to it, or, to those on whose behalf *amicus curiae* briefs have been filed. The only issues presented herein have been settled to our satisfaction by Abelleira v. District Court of Appeal, THIRD District (Calif.) 109 P. 2d 942, 132 A. L. R. 715. Despite the absence, pointed out in the response brief filed herein, of an expression regarding "due process" in Headnotes "13" and "14" of that opinion, it is said in Headnote "7" thereof, that the California "Unemployment Insurance Act", which corresponds to the Oklahoma Unemployment Security Act herein dealt with, "fulfills each requirement of 'due process of law'." That statement is repeated almost verbatim in the body of the opinion. While, as pointed out in the aforementioned respondent's brief, *employees* (as well as employers) do not contribute to the Oklahoma unemployment benefits fund, we perceive in this circumstance, no

material distinction between this case and the cited one, or any valid reason why the logic and principles therein expressed and applied concerning the only issues here presented, should not apply with equal force here. We do not think this difference renders the Oklahoma Unemployment Fund any less a "public" or "semipublic" fund than the California unemployment fund, was regarded in that case. There the court, among other things, said:

> "The foregoing cases demonstrate the weakness of the argument that because a commission may make an occasional error in ordering some payment out of a public or semipublic fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a possible small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter."

Another distinction that readily appears between the two cases is that in the California case there had been only one "affirmation" of the initial determination, instead of the "double affirmation" with an appeal before the Commission or Board of Review already concluded, as is the case here. There is some dispute in the briefs as to whether there has ever been a double administrative affirmation in the present case, and there are recitals in the Board of Review's opinion, *supra*, representing that the question of "eligibility" therein determined, (and sought

by respondent to be distinguished from the question of "disqualification") had not previously been decided. However, as hereinbefore quoted, Section 216(e) provides in part:

> "* * * If pursuant to a determination or redetermination benefits are payable in any amount * * * with respect to unemployment following the maximum disqualification period that may be imposed because of an alleged factor surrounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal." (Emphasis ours.)

We think that for the purpose of determining whether or not "last" employers, and/or employer-contributors generally, are deprived of due process of law by payment of initial benefits to claimants prior to the conclusion of a judicial review, the question of whether or not there has been a *double* administrative affirmation is unimportant. As we see it, the only significance that such a matter might have would be in determining the question of whether or not the administrative remedy has been exhausted—a question of fact which is not directly involved in the broader issues here presented.

Respondent has supplemented his brief with a recent opinion promulgated October 1st, 1956, (not yet officially reported) by the Supreme Court of Pennsylvania (E. D.) in the case of Pennsylvania State Chamber of Commerce et al. v. John R. Torquato et al., which adopts excerpts from, and affirms, an earlier opinion in the same case, promulgated by the Court of Common Pleas of

that State's Dauphin County. In one of the portions of said lower court's opinion adopted and incorporated in the Supreme Court's opinion, the following appears:

> "The Westinghouse Electric Corporation is a proper party plaintiff, not only as a contributor to the Unemployment Compensation Fund, and therefore a taxpayer: * * * (citing cases); but also because *its own reserve account will be charged with the payment of any unemployment benefits that are made and its present contribution rate thereby jeopardized.*" (Emphasis ours.)

It is not demonstrated herein that the above-emphasized statement of the court concerning Westinghouse Electric Corporation, under the Pennsylvania unemployment benefit law, is true of Aero Design & Engineering Company, and other contributors to our unemployment insurance fund, under the Oklahoma law. The Act here involved has substantially the same provision [Section 216(e)], referred to in the California law by the court in the Abelleira case, *supra*, when, in the course of its discussion of the question of whether or not an employer is deprived of any property by payment to claimants of initial benefits pending a judicial review, it said (p. 952):

> "* * * it is provided in Section 67 of the Act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. This being so, it is not clear, how a contribution can be increased by the payments, since *the factor determining the rate is made inapplicable in such event.*" (Emphasis ours.)

Nor can it be said that, under the Oklahoma Act, the unemployment insurance fund itself will suffer any *ultimate* loss or depletion, indiscriminately, or in *all* cases, by reason of the payments herein complained of, for Section 216(e) provides for "Recovery and Recoupment" within the "discretion of the Commission" and upon certain considerations referred to therein. This appears to be another distinction between the present case and the Pennsylvania case, for there the court said it was both "apparent" and "conceded" that if unemployment payments were made to the claimant they would *never* be recovered and the unemployment insurance fund would be depleted to the extent thereof. The court opined that, under the circumstances, the theatened payment was "likely to produce irreparable harm unless a supersedeas or injunction" was granted.

In State v. Davis, (W. Va.), 45 S. E. 2d 486, the court had before it the provision of the West Virginia law requiring payment of the benefits allowed by the decision of the Board of Review regardless of any further appeal. The court there regarded the question of whether or not said provision was confiscatory, as having been fully answered in the Abelleira case, *supra*. There, however, the court said:

"That case has since been modified and it is not cited as authority save to the extent that we regard sound reasoning as controlling." We are aware of no modification

in the Abelleira case which affects the questions presented in this case. It is true that after the decision of the California Supreme Court in that case, the District Court of Appeal of that State's First District in American-Hawaiian S. S. Co. v. California E. Commission, 128 P. 2d 627, 632, issued a writ of "mandate" to require that State's Employment Commissino not only to vacate its order for the payment of unemployment benefits, but to require it to refrain from charging the accounts of the involved employers with such payments. But in the latter case, it was alleged that all of such payments were in *violation of the plain terms of the California Unemployment Act*. Here, as in State v. Davis, *supra*, it has not yet been clearly shown that plaintiffs in Cause No. 138693 were attacking the Board of Review's previous decision as being "arbitrary, capricious or fraudulent * * *". In this connection, the petition filed in said cause merely alleges that there had been no "double affirmation", and prayed for a judicial review on the two grounds pertaining to eligibility and disqualification hereinbefore indicated, plus the additional ground that the board had erred in "refusing to permit plaintiff to present evidence on eligibility." Besides reversal on the first two grounds mentioned, the plaintiff prayed in the alternative that the Board's decision be vacated on said third ground, and that the cause be remanded to said Board for the taking of additional evidence "on the question of claimants' eligibility

under (Tit.) 40, O. S., (1951) (sec.) 214." The Board's opinion, which is the only record of its proceedings included in the documents filed herein, does not affirmatively show a refusal by it "to permit plaintiff to present evidence * * *". Furthermore, sec. 216(d) (7), authorizes the court in the "Judicial Review", there prescribed, to order additional evidence taken before the Board, expressly contemplates that the Board's previous findings and conclusions may be modified upon hearing such evidence, and provides that the additional findings and conclusions, together with a transcript of the additional evidence, may then be filed in the court action. If Aero Design & Engineering Company's allegations, in its petition in Cause No. 138693, are of errors of the Board of such nature as could be cured by the taking of additional evidence, it is quite conceivable that same could be resolved to its satisfaction merely by the Court's granting of the alternative relief prayed for. The court action could then be dismissed upon its motion without any other order or judgment. Still, said company would have no right, under the Act, to prevent payment of initial benefits pending the court-directed rehearing before the Board of Review.

In view of the features of the Oklahoma Employment Security Act herein referred to, we do not agree with the views that the Michigan Supreme Court voiced regarding the allegedly unconstitutional aspects of that

State's unemployment insurance law in Chrysler Corp. v. Appeal Bd. of Mich. U. C. Com'n., (Mich.), 3 N. W. 2d 302, and Chrysler Corp v. Smith, 297 Mich. 438, 298 N. W. 87. Nor do we think that the provision herein questioned, when these features are considered in connection with it, necessarily operates to permit our State's unemployment insurance fund to be used for purposes never contemplated by said Act, as was said in State v. State, (Ind.), 57 N. E. 2d 433, of such a provision in the Indiana Act. At least it has not been shown to so operate in this case. On the basis of the pleadings, record and undisputed evidence, or facts, before us, we think it clear that the reasoning of the court in the Abelleira case, hereinbefore referred to, together with the other considerations herein noted, decisively show that Aero Design & Engineering Company, the plaintiff in Cause No. 138693, failed in said cause to make a sufficient demonstration of its entitlement to the restraining order issued by the Respondent Judge therein, upon the ground that section 216(e), *supra*, deprives said company of property without due process of law. We hold that, as the matter is presented herein, said section does not have that effect upon said company, or any of the other parties appearing herein. We further hold that said portion of the law is not an unconstitutional exercise of legislative power in limitation or curtailment of the power previously vested in our district courts by Art. VII, sec. 10, Okla-

homa Constitution, to issue restraining orders and grant other relief of an injunctive character prescribed therein.

Accordingly, petitioner's application to this Court to assume jurisdiction and issue a writ to the Respondent Judge is hereby granted to the extent of directing the District Court Within And For Oklahoma County, State of Oklahoma, and said Respondent as a judge thereof, to vacate the RESTRAINING ORDER PENDENTE LITE, and desist from any further effort to prevent payment by the Oklahoma Employment Security Commission of the initial benefits to which, under the decision of said Commission's Board of Review, Jack Abraham and the other 256 employees of Aero Design & Engineering Company, are entitled.

JOHNSON, C. J., WELCH, HALLEY, JACKSON and CARLILE, JJ., Concur.

WILLIAMS, V. C. J., and CORN, J., Dissent.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JACK D. ABRAHAM, ET AL.,
Plaintiffs,
v.
HONORABLE A. P. VAN METER, DISTRICT JUDGE, OKLAHOMA COUNTY, OKLAHOMA, ET AL.,
Defendants.

No. 37396

ORDER

IT IS HEREBY ORDERED that the opinion heretofore promulgated in the above styled cause be and is hereby amended as follows:

(1) By deleting the "e" from the parenthesis immediately following "Section 216" on line 20, page 9 of said opinion, and inserting in lieu thereof the letter: "f";

(2) By deleting all of line 23 of page 8 of said opinion, except the words: "by the";

(3) By deleting from line 25 of said page, the words: "Forquato, et al.," and inserting in lieu thereof the following: "Torquato, et al., 125 A. 2d 755 * * *";

(4) By deleting all of the sentence appearing on lines 28, 29 and 30, of said page, except its first word: "In", and inserting in lieu thereof, the following: "* * * the cited case, it was said: * * *."

DONE BY ORDER OF COURT this 19th day of November, 1956.

N. B. JOHNSON,
Chief Justice.